

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FCC 95M-56  
50871

DISPATCHED BY

In Matter of ) WT DOCKET NO. 94-147  
)  
JAMES A. KAY, JR. )  
)  
Licensee of one hundred sixty )  
four Part 90 licenses in the )  
Los Angeles, California area. )

O R D E R

Issued: February 17, 1995 ; Released: February 22, 1995

1. This is a ruling on a third Request For Permission To File Interlocutory Appeal that was filed by James A. Kay, Jr. ("Kay") on February 10, 1995.<sup>1</sup> Kay seeks permission to appeal now to the Review Board the rulings of the Presiding Judge in his Memorandum Opinion And Order FCC 95M-44, released February 10, 1995 ("MO&O").<sup>2</sup> The Presiding Judge did not request any responsive pleading to be filed by the Bureau. 47 C.F.R. §1.301(b) (pleadings responsive to interlocutory appeal requests shall be filed only if requested by presiding officer).

2. Kay requests permission to take an immediate interlocutory appeal to the Review Board on the Presiding Judge's ruling wherein he found that Kay had failed to request timely a certification to the Commission within five days of the release of the Hearing Designation Order. The Presiding Judge must decide here whether Kay presents a new or novel question of law and whether there is likely to be a remand if the appeal is deferred and raised as an exception. 47 C.F.R. §1.301(b).

3. The MO&O contains a ruling on an issue that was referred to the Presiding Judge by the General Counsel. See General Counsel's Order FCC 95I-06, released February 03, 1995. There the General Counsel determined that Section 1.115(e) of the Rules of Practice requires that the Presiding Judge

<sup>1</sup> Cf. Memorandum Opinion And Order FCC 95M-49, released February 15, 1995 (whether Bureau was lawfully named as party and whether Bureau Chief was required to file a notice of appearance); and Memorandum Opinion And Order FCC 95M-25, released January 31, 1995 (Presiding Judge's denial of letter request to postpone prehearing conference and preparation for the conference).

<sup>2</sup> Kay did not refer to the ruling's citation FCC 95M-24. Kay only cites the date of an Order of the Presiding Judge that was released on February 10, 1995. At times there may be multiple rulings on the same day. Therefore, it provides a more readily focused consideration of counsels' arguments when the Presiding Judge and reviewing authorities are given the full citation.

rule first on whether the issues raised by Kay with respect to the Hearing Designation Order should be certified to the Commission. Id. The General Counsel concluded that the public interest would best be served by referral of Kay's Application For Review to the Presiding Judge for his consideration concerning certification to the Commission. Id. In MO&O FCC 95M-44, supra, the Presiding Judge determined that Kay had failed to act within the time provided under Section 1.115(e) (3) for seeking a certification of the issues to the Commission. Now, in addition to asking the Presiding Judge to permit an interlocutory appeal of his ruling to the Review Board, Kay simultaneously filed a Petition For Reconsideration that is addressed to the General Counsel wherein he seeks reconsideration of referral Order FCC 95I-6. In seeking such a reconsideration, Kay raises substantially the same issues of law with the General Counsel on which he seeks to obtain an interlocutory ruling from the Review Board.

4. Kay fails to meet the Commission's standards for an interlocutory appeal. Since the issues of law are still under advisement for reconsideration by an appellate authority at the Commission, there is no definitive ruling from which an appeal may be taken. Stated otherwise, the issues raised by Kay with respect to the Hearing Designation Order are still before the Commission. Therefore, there is no basis for determining now whether there is a likelihood of a remand of those issues to the Presiding Judge while they are sub judice before a higher reviewing authority.

5. In view of the circumstances, the request by Kay for an interlocutory appeal to the Review Board of issues which are now before the Commission on a request for reconsideration is not a ripe request. And in light of the present procedural posture of the questions which Kay now is seeking to have resolved by the Commission's highest appellate authority, request for permission to file an interlocutory appeal with the Commission's intermediate appellate authority will not be granted by the Presiding Judge.

Accordingly, IT IS ORDERED that the Request For Permission To File Interlocutory Appeal that was filed by James A. Kay, Jr. on February 10, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge